BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DANIEL A. TUCKER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,043,505
HKA ENTERPRISES, INC.	)	
Respondent	)	
AND	)	
	)	
GRANITE STATE INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals the July 7, 2010, Award entered by Administrative Law Judge Kenneth J. Hursh (ALJ). Claimant was denied benefits after the ALJ determined that claimant was not an employee of respondent on the date of accident and this matter was not subject to the jurisdiction of the Kansas Workers Compensation Act (Act).

William L. Phalen of Pittsburg, Kansas, appeared for claimant. Christopher J. McCurdy of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent). Due to the retirement of Board Member Carol Foreman, Tom Arnhold was appointed as Board Member Pro Tem to serve in her place.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. Additionally, at the oral argument to the Board, the parties stipulated that the findings of the ALJ in the Award, that claimant had an average weekly wage of $760.00 and that claimant had suffered a 5 percent whole person functional impairment and a permanent partial general (work) disability of 56.25 percent, were appropriate. Those stipulations will be utilized by the Board should this matter be found to be compensable. The Board heard oral argument on January 12, 2011.

ISSUES

This is a claim for injuries sustained as a result of a motor vehicle accident while claimant was in Louisiana and on his way to a work site or a testing site in that state. In the July 7, 2010, Award, the ALJ determined the record proved a 5 percent whole

person functional impairment and a 56.25 percent work disability as a result of the accident. However, the ALJ then found that any injuries claimant sustained did not arise out of and in the course of employment as claimant had not yet arrived at the site and he was not on the premises of either respondent (the hiring entity for several shipyards in Louisiana) or Bollinger Lockport (the shipyard where claimant was to be employed as a welder). The ALJ also found that there was not a preponderance of credible evidence to prove claimant was working under an employment contract with respondent and that claimant was not an employee of respondent when the accident occurred. With regard to jurisdiction, the ALJ stated: "It was determined . . . that there was no contract of employment made in Kansas or otherwise. The injury in this case did not occur in Kansas, and the principal place of the contemplated employment was in Louisiana. For these reasons, the injury in this case would not be subject to the Kansas workers compensation act."[1] The ALJ denied claimant compensation in this claim.

Claimant contends the evidence establishes he was hired in Kansas, an employer-employee relationship existed before claimant left Kansas and traveled to Louisiana, and his injuries arose out of and in the course of that employment. Claimant requests the Board grant him work disability benefits and that medical bills incurred be paid as authorized medical benefits.

Respondent did not file a brief with the Board. In its submission brief to the ALJ, in addition to the issues of whether claimant suffered personal injury by accident arising out of and in the course of his employment with respondent, whether the relationship of employer-employee existed on the date of the accident and whether the parties are covered by the Act, respondent listed nature and extent of disability and average weekly wage as issues, both of which are no longer disputed pursuant to the stipulation of the parties.

Respondent maintains (1) claimant did not sustain personal injury arising out of and in the course of his employment; (2) claimant was not an employee of respondent (respondent argues claimant has failed to prove he accepted an offer of employment by telephone while he was in Kansas as the activities he was required to do in Louisiana constituted conditions precedent to the formation of a contract for employment); (3) in the alternative, claimant's recovery is barred due to K.S.A. 2008 Supp. 44-508(f) (respondent contends that if claimant is taken at his word, he was on his way to the shipyards to begin work for respondent; therefore, his accident en route is not compensable; further, claimant has failed to prove the conditions necessary for the exceptions to the "going and coming

[1] Award (July 7, 2010) at 4-5.

rule"); (4) claimant's accident resulted in no permanent impairment, and his request for a work disability should be denied; and (5) claimant's average weekly wage is $760.00.

The issues before the Board on this appeal are:

1. Had claimant and respondent entered into a contract of employment on or before November 17, 2008?

2. If claimant and respondent had entered into an employment contract, where was the last act necessary to create that contract performed?

3. Does the Kansas Workers Compensation Act (Act) apply so that the Kansas Workers Compensation Division (Division) has jurisdiction over this matter?

4. Did claimant suffer personal injury by accident which arose out of and in the course of his employment with respondent? More particularly, did claimant's accident occur while claimant was on the way to assume the duties of his employment under K.S.A. 2008 Supp. 44-508(f), or had claimant's job duties already commenced?

FINDINGS OF FACT

Respondent was the hiring entity for several shipyards in the New Orleans (Louisiana) area. Claimant was a recent graduate of the Missouri Welding Institute. Claimant, while living in Fort Scott, Kansas, contacted respondent via the internet regarding a possible welding job in the New Orleans area. Through this e-mail correspondence, claimant was provided several employment forms from respondent, and also came into the possession of several other employment forms from an unknown source. Claimant regularly corresponded with Douglas Roundtree, respondent's regional manager.[2] Ms. Roundtree coordinated jobs with potential welders, fitters and electricians. In her job, Ms. Roundtree would ascertain the qualifications of the applicants, administer any testing necessary to determine their skill levels and follow whatever procedures were necessary to hire competent workers to fill the available jobs.

Ms. Roundtree testified that a requirement of the hiring process involved tests to ascertain the applicant's skill level with the desired job duty. Here, claimant was attempting to obtain a job as a welder with a local ship builder. Ms. Roundtree testified that before a person could be hired, that person must first submit an application, undergo skill testing and drug testing, and complete the application and other necessary forms.

[2] Douglas Roundtree is female.

Claimant had been provided with some employment forms, although Ms. Roundtree testified that claimant had, somehow, come into possession of certain documents which had not been provided by respondent. Claimant had also been advised that he must pass a skill test in order for him to be hired as a welder. It is noted that while most of the employment documents contain claimant's signature, there are no documents in this record containing the signature of a representative of respondent.

Claimant contends that the employment documents were completed while he was at home in Fort Scott, Kansas, and that the hiring process had been completed at that time. Therefore, the contract of employment would have been finalized while claimant was in Kansas. Claimant denied being aware of the necessity of a test. When claimant was presented with several e-mails from his e-mail address discussing the need for those tests, he testified that he had not authored those e-mails.

Claimant traveled by car to New Orleans, arriving at respondent's office on November 17, 2008. On that day, claimant was told to follow Ms. Roundtree in his car as Ms. Roundtree drove to a different location. Claimant testified that they were traveling to the ultimate job site, while Ms. Roundtree testified that they were traveling to a location where claimant would take the welding test that was required before claimant could be hired by respondent's client. While they were traveling to the disputed location, claimant's vehicle was struck from behind and then pushed into Ms. Roundtree's vehicle. Claimant sustained injuries to his neck, head and low back as the result of that accident. Claimant testified that after this accident, he developed migraine headaches and alleges permanent disability in his cervical and lumbar spine. Those injuries are the subject of this litigation. As noted above, it has been stipulated that claimant sustained a 5 percent whole person functional impairment and a 56.25 percent work disability from that accident, if this matter is found to be compensable.

Claimant initially testified that he had never experienced difficulties with migraine headaches or with low back problems before. However, at the regular hearing, claimant was forced to admit on cross-examination that he had experienced both migraine headaches and low back pain in the past. In fact, claimant had been to Maxwell Self, M.D.,[3] his primary care physician, on September 12, 2008, seeking medication for back pain which had developed while claimant was in welding school. Additionally, claimant acknowledged having a history of migraine headaches off and on for his entire life. In fact, claimant advised Devendra Jain, M.D., that his headaches had increased both in frequency and severity while he was in high school.

[3] Dr. Self is in Fort Scott, Kansas.

After the accident, Ms. Roundtree took claimant to the hospital where he was examined in the emergency room (ER). A CAT scan of claimant's neck was taken, and claimant was given medication and told to follow up with his regular physician in Fort Scott. After being released from the ER, claimant returned to Fort Scott, Kansas, where he was examined by Maxwell Self, M.D., at Fort Scott Mercy Hospital. Dr. Self took x-rays and did an MRI of claimant's back and a CT scan of claimant's head. Claimant was diagnosed with lumbar strain and cervical strain. Claimant was also referred for physical therapy. Claimant was referred to Devendra Jain, M.D. (a neurologist who specializes in migraine headaches) after claimant claimed headaches originating from the accident. Claimant testified that he has headaches daily and originally denied having any headaches before this accident. At the time of the regular hearing, claimant continued on medication as prescribed by Dr. Self and had returned to school for more advanced training in welding. Dr. Self placed unidentified restrictions on claimant, and claimant had not worked since the accident.

Claimant testified that he had not been paid by respondent for the trip to Louisiana for the time or for the travel costs. Ms. Roundtree testified that it was her job to pre-screen candidates for jobs with respondent's various clients. A welding test was mandated, after which the candidate would be given a physical, drug screen and audiogram, and then fitted with a respirator. After the completion of these test requirements, the candidate would then return to Ms. Roundtree's office to complete the application process. Until these steps are completed, no offer of employment would be extended. Ms. Roundtree advised claimant that before he could be offered employment, he had to complete the welding test and drug test. While claimant denies sending or receiving e-mails regarding the testing requirements, several e-mails from and to claimant's e-mail address discuss the need for testing.

Claimant was examined at the request of his attorney by board certified orthopedic surgeon Edward J. Prostic, M.D., on March 6, 2009. In the history provided to Dr. Prostic, claimant denied previous difficulties with his spine. He complained of bifrontal frequent headaches, pain in the center of and across his low back, with variable symptoms in his low back when he awakens in the morning, and with intermittent numbness in both heels. X-rays of the cervical spine suggested anterior wedging at C5-6. X-rays of the lumbar spine indicated mild disc space narrowing at L5-S1 but were otherwise normal. Dr. Prostic diagnosed claimant with strains and sprains of the cervical and lumbar spine. Claimant was restricted to medium level employment and was rated at 10 percent permanent partial impairment of the whole body for the cervical and lumbar spine. Dr. Prostic opined that of the 24 tasks on the list prepared by vocational expert Karen Terrill, claimant was unable to perform 6 for a 26 percent task loss.

Dr. Prostic was unaware that two months prior to the accident claimant was seeing Dr. Self for back pain. He was also unaware that claimant was using pain medication for that back pain. Dr. Prostic also agreed that he did not rate claimant's radicular complaints as they were not confirmed by physical examination.

Claimant was referred by respondent to board certified physical medicine and rehabilitation specialist Vito J. Carabetta, M.D., for an examination on December 17, 2009. The history of accident which claimant provided to Dr. Carabetta was consistent with claimant's testimony. However, claimant again denied prior back or neck complaints. During the examination, Dr. Carabetta was unable to identify any abnormal pathology with respect to either claimant's cervical or lumbar spine. Claimant did have pain in both the cervical and lumbar regions. Dr. Carabetta was provided medical records indicating that claimant had experienced low back problems in September 2008. Interestingly, claimant denied a relationship between his migraine headaches and the automobile accident. During the examination, claimant displayed subjective complaints of cervical, upper back and lower back pain, with restricted ranges of motion at all three levels. It was also noted that claimant displayed a greater range of motion when being casually observed versus during the actual examination. While claimant was being casually observed, the motion limitations were notably less. Dr. Carabetta found no ratable impairment and assessed no restrictions to claimant as the result of this accident.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[4]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[5]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[6]

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[4] K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

[5] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[6] K.S.A. 2008 Supp. 44-501(a).

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[7]

> "[A] contract is 'made' when and where the last act necessary for its formation is done. [Citation omitted.] When that act is the acceptance of an offer during a telephone conversation, the contract is 'made' where the acceptor speaks his or her acceptance. [Citations omitted.]"[8]

> It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act to both. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.[9]

Jurisdiction is conferred on the Division where: "(1) The principal place of employment is within the state; or (2) the contract of employment was made within the state, unless the contract otherwise specifically provides . . . ."[10]

The Board must first consider where the contract was "made."

Claimant contends he was hired while in his home in Fort Scott, Kansas. In support of his argument, claimant points to several employment documents allegedly provided by respondent via e-mail. Respondent argues that several of the documents were not the normal document which would be provided a prospective employee. Additionally, none of

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[7] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[8] *Speer v. Sammons Trucking*, 35 Kan. App. 2d 132, 128 P.3d 984 (2006), *citing Shehane v. Station Casino*, 27 Kan. App. 2d 257, 261, 3 P.3d 551 (2000).

[9] K.S.A. 2008 Supp. 44-501(g).

[10] K.S.A. 44-506.

the documents placed into this record contain a signature of a respondent representative. Respondent contends that a contract for hire was never created as claimant had not fulfilled all the conditions precedent to the formation of that employment contract.

The events leading up to the automobile accident are vigorously disputed. Respondent claims that claimant was required to take both a welding test and a drug test before he was eligible for hire. Claimant emphatically denies the existence of a pre-employment test. However, the e-mails between claimant and Ms. Roundtree tell a story different from claimant's. Several e-mails, originating both by claimant and by Ms. Roundtree, discuss the need for the testing. Claimant even inquires in one e-mail whether the welding test will be for a stick or flux core test. These e-mails support respondent's contention that a contract for hire had not been entered into at the time of the accident. Claimant does not contend that the principal place of employment is within the state of Kansas. Therefore, the only way for an out-of-state accident to be compensable would be for the contract to be formed in this state. However, claimant's contention that the contract was formed while he was in his home in Fort Scott, Kansas, is not supported by this record. Pursuant to the Supreme Court's holding in *Speer*,[11] the last act necessary for the formation of an employment contract had not occurred at the time of the accident. Therefore, no employer-employee contract had been created. Claimant's accident could not arise out of and in the course of his employment with respondent as no such employment existed. The denial of benefits by the ALJ should be affirmed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant has failed in his burden of proving that there was a Kansas contract of hire. Additionally, it is found that respondent's principal place of business is Louisiana.

These findings render moot the remaining issues raised by claimant on this appeal.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Kenneth J. Hursh dated July 7, 2010, should be, and is hereby, affirmed in that claimant has failed in his burden of proving that he was an

[11] *Speer, supra.*

employee of respondent on the date of accident. Additionally, respondent's principal place of business is Louisiana. No contract of employment was created in the state of Kansas.

IT IS SO ORDERED.

Dated this ____ day of February, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge